

Testimony of

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On behalf of the

American Chemistry Council
American Pyrotechnic Association
Chlorine Institute
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National Association of Chemical Distributors
Nuclear Energy Institute
The Fertilizer Institute

Before the

Subcommittee on Economic Security and Infrastructure Protection
of the
Committee on Homeland Security

Concerning the

“SAFE Truckers Act of 2006”

June 16, 2006

Chairman Lungren, members of the Subcommittee, I appreciate the opportunity to testify on the important issues surrounding security clearances of persons authorized to transport by motor vehicle certain security sensitive hazardous materials (SSHM) in commerce.

My testimony is presented on behalf of the American Chemistry Council, the American Pyrotechnic Association, the Chlorine Institute, the Institute of Makers of Explosives, the National Association of Chemical Distributors, the Nuclear Energy Institute, and The Fertilizer Institute. We are representative of the shipper community. Since virtually all hazardous materials shipments move at some point by motor vehicle, the industries we represent are dependant on the availability of qualified drivers to move, safely and securely, the hazardous materials we manufacture and use. We have a long history of proactive attention to the safe and secure transportation of our products – transportation that is both intermodal and international.

Our efforts to address transportation security concerns have been aided by government requirements to assess vulnerabilities and to take appropriate corrective actions to bolster the security of our operations. Private efforts to vet the suitability of drivers and other transportation workers stood to be enhanced by government oversight that could assess criminal record databases and tap intelligence about security risks. Before the events of September 11, 2001, the Department of Defense and Nuclear Regulatory Commission were engaged in these vetting operations. Since September 11th, 2001, however, we have seen a plethora of government-mandated security clearance requirements that are duplicative for individuals, unduly restrictive in their disqualifications, and unnecessarily costly. We believe that improvements are warranted.

The legislation we have been asked to comment on today proposes to add yet another fingerprint-based security credential to those already in existence. Within the Department of Homeland Security (DHS) alone, a driver could potentially be subject to the Transportation Security Administration's (TSA) threat assessment program for commercial drivers of hazardous materials (HME), to TSA's transportation worker identification credential (TWIC), to TSA's criminal history records check for unescorted access to security identification display areas, and to the Customs and Border Protection's free and secure trade clearance to expedite border crossings of trucks that provide security information in advance. The creation the security sensitive materials permit for essentially the same population frustrates expectations that this legislation would simplify security clearance requirements for drivers. We would like to suggest an alternative means to accomplish the goal to create a fingerprint-based security credential for security sensitive materials, as well as recommendations to further simplify driver background checks generally, and to identify aspects of this legislation deserving of support.

TWIC¹

We are struck with the redundancy suggested by the pending legislation. The proposal would require a new permit to transport SSHM by motor vehicle, ostensibly indicating that the recipient is being held to a higher standard than the holder of an HME. However, the legislation fails to

¹ These comments should not be construed as an endorsement of TSA's notice of proposed rulemaking to implement the TWIC published in the Federal Register on May 22, 2006. [Docket Nos. TSA-2006-24191; USCG-2006-24196. 71 FR 29396.]

identify what standards would be used by DHS to disqualify a permit applicant, leaving this critical determination up to the discretion of the department. At the same time, the legislation provides that individuals holding a TWIC would be deemed to have met the security clearance requirements of the new permit. However, the disqualifications underpinning the HME are the same as used in the TWIC. This legislation unnecessarily complicates the security vetting process without enhancing security or providing relief to HME drivers of non-SSHM. We strongly recommend that the scope of the TWIC be broadened to simply provide that a holder of a TWIC is also eligible to transport SSHM by motor carrier if the holder is otherwise qualified to operate a commercial motor vehicle. We also recommend that the HME threat assessment required by 49 U.S.C. 5103a be converted to a records-based, not a fingerprint-based, security check. This change will provide appropriate regulatory relief for drivers transporting placarded shipments of the hazardous materials that are not deemed SSHM. Since the TWIC requires the more stringent fingerprint-based security check, it should be made clear that a holder of a TWIC, who is otherwise qualified to operate a commercial motor vehicle, should be eligible to apply for an HME without being subject to the §5103a threat assessment.

The promise of the TWIC was that it would be the sole credential necessary for transportation workers subject to security assessments. The card would establish identity and would be issued after a determination that the cardholder did not present a security risk. To propose anything in addition is to penalize legitimate, qualified workers.

Penalty Provisions

The penalty provisions in the legislation were initially lifted in whole cloth from federal hazardous materials transportation law. Despite some changes, we remain concerned about the effect of these provisions. First, this is a credentialing statute, not a statute directed at harms that could be caused by individuals irrespective of whether they do or do not possess a TWIC/SSHM credential. These later violations and criminal acts are the subject of other federal statutes and are unnecessary here.

We understand that a justification for higher civil penalties stems from the provision that makes it a violation to offer or cause security sensitive materials to be transported by motor vehicle if the operator does not hold a valid TWIC/SSHM credential. Even in instances where security sensitive material is offered or caused to be transported by a driver not holding a valid TWIC/SSHM credential, the penalty should be in the thousands, not tens of thousands of dollars. Keep in mind that the offeror only has the wherewithal to check the credential of the driver initially receiving the shipment. The security statuses of individuals who may subsequently handle the shipment for a carrier are beyond the offeror's control. Additionally, each day the violation continues is a separate offense subject anew to accumulating fines. The penalty caps should be limited accordingly.

A number of terms are used in the penalty provisions to trigger more severe consequences. These terms - "bodily injury", "serious illness", "severe injury", and "substantial destruction of property" - are undefined. Without definition, the interpretation of these board terms will likely result in unequal application of the law and justice will not be served.

Finally, the penalty provisions have been stripped of commonly accepted standards of culpability leaving a strict standard of liability. The Subcommittee should reinstate a "knowingly" standard of liability for civil violations and a "willfully" standard for criminal acts.

Preemption

The proposal's definition of "commerce" suggests that the SSHM credential is to apply to motor carrier movements of SSHM in intrastate, interstate and foreign commerce. However, neither this credential nor the TWIC is given preemptive effect over non-federal transportation security credentials. We recommend that the legislation explicitly provide that non-federal transportation security credentials for activities covered by the TWIC (and by extension the motor carriage of SSHM) be preempted. No state or locality can possibly have more resources or capability than the federal government to assess threats and determine protective actions for a network of critical infrastructure that operates nationwide. A panoply of non-federal credentials is more likely to lead to confusion and non-compliance with federal requirements. All additional or more stringent non-federal security credentialing requirements will do is place an unjustified burden on legitimate transportation workers.

Provisions Deserving Support

- **Determination of Security Sensitive Materials:** We fully support the provision that would task DHS with determining by notice and comment rulemaking to determine the type and quantity of materials to be designated "security sensitive". History has shown that materials of interest to terrorists have changed over time. It is appropriate for DHS to have the flexibility to adjust through rulemaking materials that would be subject to these requirements.
- **Elimination of State Administrative Middleman:** We support provisions in the bill that remove the credentialing of SSHM drivers from the commercial vehicle licensing process. State governments do not control the federal databases through which security checks are vetted.
- **Memorandum of Understanding:** We support the provision directing the Secretaries of DHS and the Department of Transportation to enter into a memorandum of understanding about the implementation of transportation credentialing requirements.
- **Task Force on Disqualifying Crimes:** We support the establishment of a task force to review the appropriateness of current disqualifying crimes. In particular, we believe that the stringency of some automatic life-time disqualifications warrant review when the triggering event is a non-violent felony.
- **Task Force on Redundant Checks:** We fully support efforts to integrate, streamline and rank security credentialing requirements so that individuals will be subject to no more than one finger-print based credential based on the level of security clearance their job requires.

Other Recommendations

I would like to submit for the record a document that more fully identifies and describes recommended modifications to the pending legislation.

This concludes my testimony.